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THE SUPREME COURT'S CONSTRUCTION OF THE FEDERAL CONSTITUTION IN 1920-1921, IV[1]

VI. RETROACTIVE CIVIL LEGISLATION

WHILE the Constitution does not in terms forbid the United States, as it forbids the states, to pass any law impairing the obligation of contracts, the principle has become established that contracts made by the United States may create rights of which individuals may not be divested. This principle is attached to the Fifth Amendment's prohibition against depriving any person of property without due process of law. In applying this principle, *United States* v. *Northern Pacific Ry. Co.*[2] held that a grant of land to a railroad to induce its construction is a contract, and that provisions for substituting indemnity lands to supply losses "in the place limits" confer substantial rights under the protection of the due-process clause. Government authorities had issued patents for certain indemnity lands which they later sought to revoke because before issue the land in question had been withdrawn for the creation of a forest reserve. The company resisted revocation on the ground that at the time of the withdrawal there was not enough indemnity land left to make up for the losses in the place limits. The court held that the government cannot defeat its original grant by withdrawing indemnity lands when there are not enough other indemnity lands left to enable it to comply with that grant, and that the general rule that no right attaches to any specific land until it is "selected" does not apply as between the government and the

[1] For the preceding installments reviewing cases on Miscellaneous National Powers, Regulation of Commerce, Taxation, Police Power, and Eminent Domain, see 20 MICH. L. REV. 1-23, 135-172, 261-288 (November and December, 1921; January, 1922).

[2] 256 U. S. 51, 41 Sup. Ct. 439 (1921).

grantee when the lands available for indemnity are not sufficient for that purpose. There was doubt as to the quantity of indemnity land remaining at the time of the withdrawal in question, and the case was sent back for determination of the facts.

In three other cases, parties who relied on contracts with the federal government to defeat unwelcome action were unable to convince the court that they had the contractual rights asserted. *Chase* v. *United States*[3] involved an Indian who claimed a vested right to select eighty acres of land under an act of 1882 as against a later act of 1912 which stood in his way. Mr. Justice McKenna contented himself with declaring that "the contention is one that has often been made in this court and rejected as often as made," and with citing previous cases. The ground seems to be that the statute relied on created no rights in individual Indians. In *Missouri, K. & T. Ry. Co.* v. *United States*[4] a carrier who objected to a reduction of its compensation for carrying the mails was reminded that the contract on which it relied was made subject to all postal laws and regulations which were then or might later become applicable, and that it was absurd for it to suppose that it might, as it did, "discontinue an important item of the services upon which the compensation was computed, and still demand the same pay." *District of Columbia* v. *R. P. Andrews Paper Co.*[5] allowed the District to charge rent for vaults under the sidewalk, holding that the original permits were revocable licenses and not contracts, and that the District is not restricted to the charges and regulations in force at the time the permit was granted.

The two decisions sustaining rent regulation applied the familiar principle that contracts between private parties are subject to appropriate exercises of the police power and that this liability is a part of their obligation which therefore is not impaired when the police power is exercised. *Block* v. *Hirsh*[6] sustained the law passed by Congress for the District of Columbia. The majority opinion said nothing about the obligation of contracts, but the minority insisted that "a contract existing, its obligation is impregnable." In *Marcus*

[3] 256 U. S. 3, 41 Sup. Ct. 417 (1921).
[4] 256 U. S. —, 41 Sup. Ct. 617 (1921).
[5] 256 U. S. —, 41 Sup. Ct. 545 (1921).
[6] 256 U. S. —, 41 Sup. Ct. 458 (1921), 20 MICH. L. REV. 274.

Brown Holding Co. v. *Feldman*,[7] which sustained the New York rent laws, Mr. Justice Holmes for the majority said: "But contracts are made subject to this exercise of the power of the state, when otherwise justified, as we have held this to be." Of the cases cited in support, Mr. Justice McKenna for the minority observed that "there is not a line in any of them that declares that the explicit and definite covenants of private individuals engaged in a private and personal matter are subject to impairment by a state law." The proper meaning of this is that the rent laws are not proper exercises of the police power, since they deal with purely private matters. Mr. Justice McKenna himself in sustaining a law requiring employers to substitute contributions in a state fund for private insurance, in *Thornton* v. *Duffy*[8] declared that "an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts." He also wrote the opinion in *Walls* v. *Midland Carbon Co.*,[9] which passed over in silence the objection that a statute forbidding the use of natural gas for making carbon black impaired previous contracts for the sale of carbon black. In *Erie Railroad Co.* v. *Board of Public Utility Commissioners*,[10] which compelled construction of underpasses to remove grade crossings, Mr. Justice Holmes remarked that "contracts made by the road are made subject to the possible exercise of the sovereign right."

These cases might lead to the inference that past contracts never may stand in the way of the application of state police measures; but we know that one of the earliest decisions on the obligation-of-contracts clause prohibited a state from applying a bankruptcy law to debts created prior to its enactment. This decision is one of the authorities relied on by Mr. Justice McReynolds in *Bank of Minden* v. *Clement*[11] for the conclusion that the exemption laws of

[7] 256 U. S. —, 41 Sup. Ct. 465 (1921). 20 MICH. L. REV. 278. In 5 MINN. L. REV. 474 this case is considered from the standpoint of the obligation-of-contracts clause.

[8] 254 U. S. 361, 41 Sup. Ct. 137 (1920), 20 MICH. L. REV. 267.

[9] 254 U. S. 300, 41 Sup. Ct. 118 (1920), 20 MICH. L. REV. 261.

[10] 254 U. S. 394, 41 Sup. Ct. 169 (1921), 20 MICH. L. REV. 283.

[11] 256 U. S. 126, 41 Sup. Ct. 408 (1921). See 21 COLUM. L. REV. 598, and 8 VA. L. REV. 58.

a state cannot deprive creditors of assets to which they were entitled under the law at the time the indebtedness arose. A Louisiana law of 1914 provided that insurance policies payable to the estate of the assured shall be exempt from attachment for his debts. Before this the late Mr. Clement had borrowed money and had taken out insurance payable to his estate. Under the law then applicable the policies payable to his estate became his property subject to the claims of his creditors. Without any analysis of the problem other than that to be inferred from citation of decisions and quotation from opinions, Mr. Justice McReynolds declares that "so far as the statute of 1914 undertook to exempt the policies and their proceeds from antecedent debts it came into conflict with the federal Constitution." Mr. Justice Clarke dissented.[12]

In two cases complainants were unable to establish the contracts relied on to defeat police measures. The much-litigated Detroit street railroad controversy came before the court again in *Detroit United Ry.* v. *Detroit*.[13] It previously had been decided that the original franchise of the road had expired, but the company claimed contractual rights in ordinances permitting it to continue to do business. These ordinances expressly declared that the permits granted might be revoked and that action under the so-called day-to-day agreement should not waive the rights of the city or of the company. A decree in the state court fixing the terms of temporary operation stated that it should not affect the fundamental rights of

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[12] For discussions of various phases of the problem of retroactive civil legislation, see Nathan Isaacs, "John Marshall on Contracts: A Study in Early American Juristic Theory," 7 VA. L. REV. 413; C. Brewster Rhoads, "The Police Power as a Limitation upon the Contractual Right of Public Service Corporations," 69 U. PA. L. REV. 317; William Trickett, "Is a Grant a Contract?" 54 AM. L. REV. 718, 25 DICKINSON L. REV. 31; E. J. Verlie, "Retrospective Legislation in Illinois," 3 ILL. L. BULL. 28; and notes in 19 MICH. L. REV. 112, 547, on the power of the state to raise rates fixed by contract between a city and the carrier; in 6 CORNELL L. Q. 432, 19 MICH. L. REV. 866, and 30 YALE L. J. 862, 869, on the constitutionality of statutes permitting arbitration when agreed upon in a contract; in 34 HARV. L. REV. on validating unauthorized collection of canal tolls; and in 30 YALE L. J. 759 on whether a vested right is created by a statute permitting the condemnee of land to repurchase after the abandonment of the public use for which it was taken.

[13] 255 U. S. 171, 41 Sup. Ct. 285 (1921), 20 MICH. L. REV. 285.

the parties. These stipulations were found sufficient to defeat the claim that the company had a contractual right to continue. A claim of estoppel was negatived because, at the time of the acts of the city relied on to create the estoppel, the state constitution forbade the grant of an irrevocable franchise except upon the affirmative vote of three-fifths of the electors, which vote had not been taken. Therefore the company might be ordered to remove its tracks and there was no impediment in the the way of the city's proceeding to construct or acquire tracks for a municipal road.

The statute involved in *International Bridge Co.* v. *New York*[14] required the construction of a roadway for vehicles and a pathway for pedestrians on a railroad bridge of a company whose original charter permitted but did not command such accommodations. The change from permission to compulsion was held to be justified by the reserved power to amend the charter. It appeared also that an intervening statute permitting the consolidation of two bridge companies subjected the new corporation to all the duties of each of the consolidated companies. One of these companies had a Canadian charter which required the construction of a roadway and pathway. To the contention that this requirement was confined to the Canadian part of the bridge, Mr. Justice Holmes replied that "it would be quibbling with the rational understanding of the duty assumed to say that the company could have supposed that it had a contract or property right to confine its building of the foot-path and carriage-way to the Canadian side of the boundary line." A question as to the amount of the fees authorized to be charged for these new accommodations was put to one side as not connected with the issue whether the accommodations might be required, since the fees might be raised if at any time they proved too low.

It is familiar that legislative exemptions from taxation may be contracts which the state may not later impair, but that the courts lean strongly against finding a contract. This strong leaning finds illustration in *Troy Union R. R. Co.* v. *Mealy*.[15] In 1852, a city and

[14] 254 U. S. 126, 41 Sup. Ct. 56 (1920), 20 MICH. L. REV. 140, 285. Chief Justice White and Justices McKenna and McReynolds dissented, but did not indicate their objections.

[15] 254 U. S. 47, 41 Sup. Ct. 17 (1920). See 34 HARV. L. REV. 541, 553, 19 MICH. L. REV. 438, and 30 YALE L. J. 427.

four railroads formed a corporation to erect a union station under a contract in which the city covenanted to try to get the legislature to limit the assessment of the station to $30,000, the capital of the corporation, and in case the legislature did not do so, to refund city taxes on any amount exceeding $30,000. In 1853 the legislature passed a statute providing that the property of the corporation should be assessed at the amount of the capital stock of the company, and no more. In 1886 and 1887 the city sought to assess the station for more than twenty times the agreed $30,000, but it was held by the state court that it could not do so. In 1909, however, the act of 1853 was repealed and the city thereafter tried again to escape the $30,000 limit. The case as it came to the Supreme Court involved only the question whether the statute of 1853 was a contract. As to that, Mr. Justice Holmes declared:

> "The Court of Appeals held that the concession in the act of 1853 was spontaneous and belonged to the class of *privilegia favorabilia,* * * * and therefore was subject to repeal. This is a question upon which we should be slow to differ with a decision of the New York courts with regard to a New York corporation. It may be that too much stress was laid upon the absence of a consideration for the exemption, * * * and that a fairly strong argument could be made for interpreting the grant of 1853 as purporting to be co-extensive with the contract recited in that grant, whether correctly recited or not. * * * But taking into consideration the general attitude of the courts toward claims of exemption, adverted to by the Court of Appeals, the fact that the agreement of 1858 shows that the parties concerned did not suppose that they had an irrevocable grant, and especially the fact that the constitution of New York in force in 1853 provided in Article VIII, Section 1, that all general laws and special acts passed pursuant to that section might be altered or repealed, we are not prepared to say that the decision below was wrong."

The agreement of 1858 to which Mr. Justice Holmes refers was one in which foreclosure proceedings brought by the city were dropped and the city agreed that if the act of 1853 should be repealed

it would join in an application to the legislature to renew the exemption, and again covenanted that if the desired law was not passed it would refund city taxes in excess of $30,000, as before. Whether the city could be made liable for a refund on this agreement was not passed upon in the court below and so was not considered by the Supreme Court.

Sometimes it is the state which relies on contracts entered into by individuals or corporations in order to defeat objections to requirements which the state later imposes. It is well established that charter provisions with regard to the fares to be charged by railroads may be contracts binding on both parties so that the company may defeat attempts to lower the fares or the state may insist that the fares fixed in the contract must continue even though they become so unremunerative that they could not be imposed as an exercise of the police power. In two cases in which rates previously fixed by cities had become confiscatory with the rise in cost of operations the cities contended unsuccessfully that the rates had been fixed by contract and that therefore the companies continued to be bound by them. In *Southern Iowa Electric Co.* v. *Chariton*[16] Chief Justice White stated the applicable principles as follows:

> "Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations * * *; and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial."

The city here relied on a provision in the franchise ordinance which limited the fares to be charged. The decision that this limitation

[16] 255 U. S. 539, 41 Sup. Ct. 400 (1921), 20 MICH. L. REV. 281. See 19 MICH. L. REV. 886, and 20 MICH. L. REV. 224.

was not contractual in nature but merely an exercise of legislative power was based on a line of Iowa decisions holding that the legislature had withheld from cities the power to contract. One of these cases was squarely in point, as it had allowed a company to raise rates above the limit fixed in the ordinance granting its franchise.

The issue in *San Antonio* v. *San Antonio Public Service Co.*[17] was more complicated. In 1899, when the company acquired its franchise under an ordinance fixing a five-cent fare, the Texas constitution provided that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made, but all privileges and franchises granted by the legislature or created under its authority shall be subject to the control thereof." The Texas court had held that this left the legislature free to require half-fares for school children, notwithstanding a franchise prescription of a five-cent fare. Chief Justice White assumes that what is not sauce for the company is not sauce for the city and that if the hands of the state are not tied the hands of the roads are also free from any contract obligation. The contention to the contrary is disposed of as follows:

> "And this is true, also, of the suggestion, made in argument, that, although no contract was possible under the constitutional restriction which would bind the city not to lower the rate, nevertheless there was a unilateral contract or condition, resulting from the granting of the franchise, which bound the railway company to the franchise rate, since again there is not the slightest suggestion of any attempt on the part of the parties to produce such a condition. But, besides, the error underlying the proposition is not far to seek. The duty of an owner of private property used for the public service to charge only a reasonable rate, and thus respect the authority of government to regulate in the public interest, and of government to regulate by fixing such a reasonable rate as will safeguard the rights of private ownership, are interdependent and reciprocal. Where, however, the right to contract exists, and the parties, the public on the one hand and the private on the other, do so contract, the law of the

[17] 255 U. S. 547, 41 Sup. Ct. 428 (1921), 20 MICH. L. REV. 281. See 20 MICH. L. REV. 224.

> contract governs both the duty of the private owner and the governmental power to regulate. Where, therefore, as in the case supposed in the argument, the regulating power of government being wholly uncontrolled by contract, it would follow that that power would be required to be exerted and hence the supposed condition operating upon the private owner would be nugatory. Such a case really presents no question of a condition, since it resolves itself into a mere issue of the exercise by the government of its regulatory power."

It appeared further that after 1912, the city had power to contract and that in consenting to a consolidation of companies into the complainant company the city stipulated that the new concern should be subject to the limitations, duties, and obligations which rested on the original companies. This was held not to convert the original fare limitation into a contract. It is worthy of note that the case originated in the federal court and that the decision professes to be based on the law of the state as laid down by the state court. The Texas court had never held that the companies were not bound by the terms of their franchises, but only that the state was not bound. The former does not necessarily follow from the latter. It is quite possible that state courts will hold that franchise provisions are contractual conditions on the rights of the recipient though not on the power of the grantor; *i. e.*, that the permission granted to the railroad is limited to the designated fare even though neither the city nor the legislature could bind itself not to exercise its regulatory power to reduce the fare. If this happens we shall have a different situation from that presented in the *San Antonio* case. The Supreme Court may then follow the state court on a matter of state law, or it may hold the state decision erroneous, as it frequently does when it thinks that state courts have in effect allowed the impairment of the obligation of contracts by unwarrantably holding that no contract existed or that its provisions do not preclude the legislation complained of. The Supreme Court would be likely to follow a long line of state decisions that cities had power to contract and had contracted, but to look askance at a new decision which it thought the complainant was not reasonably bound to anticipate.

VII. Immunities of Persons Charged with Crime

1. *Searches and Seizures*

Though the Fourth Amendment declares that the right of the people to be secure against unreasonable searches and seizures shall not be violated, it provides for no machinery for enforcing the guaranty. The methods of enforcement worked out by the courts include the granting of petitions for the return of papers and effects wrongfully taken and the exclusion of such papers from use as evidence against their rightful possessor. The second form of protection is based in part on the so-called privilege against self-incrimination conferred by the declaration of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. Apparently also the granting of petitions for the return of papers is sometimes based on the Fifth as well as on the Fourth Amendment. The two amendments are so joined in the opinions of the past term that cases based on both are not securely to be taken as interpretations of either alone. The separation here indulged in may therefore be open to suspicion, but it is nevertheless ventured in the hope that it may perhaps be serviceable and that this warning to the reader will put him on his guard against being misled.

Burdeau v. *McDowell*[18] involved a petition asking for an order to a prosecuting attorney to return certain papers which had been stolen from the petitioner by agents of his employer and by them turned over to the government to be used in proceedings before the grand jury. In justifying the denial of the petition Mr. Justice Day declared:

> "The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested

[18] 256 U. S. —, 41 Sup. Ct. 574 (1921). See 22 Colum. L. Rev. 77, 35 Harv. L. Rev. 84, 20 Mich. L. Rev. 353, 6 Minn. L. Rev. 70, 7 Va. L. Reg. n. s. 288, and 31 Yale L. J. 335.

occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

In the present case the record clearly shows that no official of the federal government had anything to do with the wrongful seizure of the petitioner's property, or any knowledge thereof until several months after the property had been taken from him and was in the possession of the Cities Service Company. It is manifest that there was no invasion of the security afforded by the Fourth Amendment against unreasonable searches and seizure, as whatever was done was the act of individuals in taking the property of another. A portion of the property so taken and held was turned over to the prosecuting officers of the federal government. We assume that petitioner has an unquestionable right of redress against those who illegally and wrongfully took his private property under the circumstances here disclosed, but with such remedies we are not now concerned."

A dissenting opinion by Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, thought that such irregular acquisition ought not to make the government's possession of the papers rightful even though no provision of the Constitution requires their surrender.

Among the papers involved in *Gouled* v. *United States*[19] was one that had been stolen from the accused by agents of the Intelligence Department of the United States Army and by them turned over to a federal prosecuting officer and used against the defendant at his trial. In holding that this taking was a violation of the Fourth Amendment Mr. Justice Clarke observed:

"The prohibition of the Fourth Amendment is against unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force and coer-

[19] 255 U. S. 298, 41 Sup. Ct. 261 (1921). See 5 MINN. L. REV. 465, and 30 YALE L. J. 769.

cion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Without discussing them, we cannot doubt that such decisions as there are in conflict with this conclusion are unsound, and that, whether entrance to the home or office of a person suspected of crime be obtained by a representative of any branch or subdivision of the government of the United States by stealth, or through social acquaintance, or in the guise of a business call, and whether the owner be present or not when he enters, any search and seizure subsequently and secretly made in his absence, falls within the scope of the prohibition of the Fourth Amendment."

The other papers involved in the case had been taken under search warrants accompanied by affidavits which, so far as appeared, sufficiently described the papers to be seized. The question whether the seizure was reasonable was said to depend upon whether the papers were wanted merely as aids in securing the conviction of the accused or because their retention by their possessor was in itself unlawful or was an aid in his nefarious enterprise. This contrast was set forth by Mr. Justice Clarke as follows:

"The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched and the persons or things to be seized,' searches, and seizures made under them, are to be regarded as not unreasonable, and therefore not prohibited by the amendment. Searches and seizures are as constitutional under the amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them—the permission of the amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All this is abundantly recognized in the opinions of the Boyd and Weeks Cases, *supra,* in which it is

pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized under search warrants, lawfully applied for, issued and executed.

Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law and as the result of the Boyd and Weeks Cases, *supra,* they may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in criminal or penal proceedings, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken."

As the certificate of the circuit court of appeals failed to show that the government had any interest in the seized papers other than as evidence against the accused, the seizure was held unlawful and the use of the paper as evidence after due objection was held a violation of the privilege against self-incrimination.

The property involved in *Amos* v. *United States*[20] was whiskey taken without any warrant by revenue officers from the home of the defendant in his absence. His wife was present and made no resistance to the search, but the court found "implied coercion" on the part of the officers and declared that it was therefore unnecessary to consider whether the constitutional immunity of the husband might be waived by his wife. The conviction was set aside because

[20] 255 U. S. 313, 41 Sup. Ct. 266 (1921). See 5 MINN. L. REV. 465.

of the wrongful refusals of the trial judge to exclude the whiskey as evidence and to strike out the testimony of the revenue officers as to their search and its results. The questions as to the introduction of the evidence in this case and in the *Gouled* Case will be considered more in detail in the paragraphs dealing with the privilege against self-incrimination.[21]

2. *Self Incrimination*

It is now established that the privilege against self-incrimination includes immunity from the use against an accused of papers taken from him by an unconstitutional search and seizure. There has in the past been some uncertainty as to what steps must be taken on behalf of the accused to enable him to take advantage of this immunity. Some cases have seemed to indicate that a petition before trial for the return of the papers is a necessary prerequisite to an objection to their introduction in evidence. This requirement is somewhat relaxed by the decisions handed down at the last term of court. In *Gouled* v. *United States*[22] one of the papers introduced in evidence had been stolen from the defendant by a government agent. The accused was ignorant of the theft and so could not petition for its return before trial. In answering the question certified by the circuit court of appeals whether the taking of the paper was a wrongful search and seizure, Mr. Justice Clarke assumed that one of the grounds on which the trial court overruled an objection to the introduction of the paper in evidence against the accused was that his objection came too late. To this he answered that "the objection was not too late, for, coming as it did promptly upon the first notice the defendant had that the government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable." It must be regarded by the court as equally inapplicable to the issue whether the accused was in a

[21] The use of evidence obtained by wrongful search and seizure is considered in Osmond K. Frankel, "Concerning Searches and Seizures," 34 HARV. L. REV. 361; and notes in 15 ILL. L. REV. 393, 19 MICH. L. REV. 355, and 6 VA. L. REG. n. s. 850. In 21 COLUM. L. REV. 291 is a note on a case holding that contraband property need not be returned even after seizure under an insufficient warrant.

[22] Note 19, *supra*.

position to claim immunity from the use of the paper under the Fifth Amendment, since immunity under that amendment was affirmed in the decision. On this point Mr. Justice Clarke said:

> "In practice the result is the same to one accused of crime, whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence, and the Fifth Amendment forbids that he shall be compelled to be a witness against himself in a criminal case."

Other papers in the case were seized under a search warrant held invalid because issued primarily to obtain evidence against the accused. The introduction of these papers in evidence was held an infringement of the immunity against self-incrimination. A petition for return of the papers had been filed before trial and denied. In holding that the trial court should upon objection to the introduction of the evidence consider anew whether the papers had rightfully come into the possession of the government Mr. Justice Clarke said:

> "The papers being of 'evidential value only' and having been unlawfully seized, this question really is whether, it having been decided on a motion before trial that they should not be returned to the defendant, the trial court, when objection was made to their use on the trial, was bound to again inquire as to the unconstitutional origin of the possession of them. It is plain that the trial court acted upon the rule, widely adopted, that courts in criminal trials will not pause to determine how the possession of the evidence has been obtained. While this is a rule of great practical importance, yet, after all, it is only a rule of procedure and therefore it is not to be applied as a hard and fast formula to every case, regardless of its special circumstances. We think rather that it is a rule to be used to secure the ends of justice under the circumstances presented by each case, and where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion

> for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial. A rule of practice must not be allowed for any technical reason to prevail over a constitutional right.
>
> In the case we are considering the certificate shows that a motion to return the papers, seized under the search warrants, was made before the trial and was denied, and that on the trial of the case before another judge, this ruling was treated as conclusive, although, as we have seen, in the progress of the trial it must have become apparent that the papers had been unconstitutionally seized. The constitutional objection having been renewed, under the circumstances, the court should have inquired as to the origin of the possession of the papers when they were offered in evidence against the defendant."

On its facts this case holds no more than that a petition before trial for return of papers is not a prerequisite to an objection to their introduction in evidence if knowledge of the government's wrongful possession is first acquired when the papers are offered in evidence, and that the wrongful denial of a petition before trial for return of papers does not conclude the issue and relieve the trial court of inquiring whether the papers offered in evidence were rightly obtained. Some of Mr. Justice Clarke's language, however, goes further and implies, if it does not definitely state, that the trial court must consider an objection to the use of the papers in evidence whenever it is probable they were obtained by an unconstitutional search or seizure, thus dispensing with any prerequisite of petition before trial.

That the *Gouled* case is understood by the court to go further than the facts required it to go seems evident from the reliance on it in *Amos* v. *United States*,[23] decided on the same day, in which Mr. Justice Clarke again wrote the opinion. Here the defendant's wife knew of the wrongful seizure by government officers at the time when it was made. There is no indication that the defendant was surprised by their testimony that they found the whiskey; his

[23] Note 20, *supra*.

advance knowledge that they had it is apparent from the fact that after the jury was impaneled and before it was introduced in evidence he moved to have it returned to him. This motion was denied by the trial court, as was also a motion to strike out the testimony of the officers and to exclude the use of the whiskey as evidence. In holding these denials wrongful, Mr. Justice Clarke said:

> "The answer of the government to the claim that the trial court erred in the two rulings we have described is that the petition for the return of defendant's property was properly denied, because it came too late when presented after the jury was impaneled and the trial, to that extent, commenced, and that the denial of the motion to exclude the property and the testimony of the government agents relating thereto, after the manner of the search of the defendant's home had been described, was justified by the rule that in the progress of the trial of criminal cases courts will not stop to frame a collateral issue to inquire whether evidence offered, otherwise competent, was lawfully or unlawfully obtained. Plainly questions thus presented for decision are ruled by the conclusions this day announced in *Felix Gouled* v. *United States*."

Thus the requirement of petition before trial has evaporated even when the facts necessary to make such a petition are known to the defendant. The *Amos* case plainly is unwarranted by the actual decision in the *Gouled* case. It goes beyond that case in requiring an objection to the introduction of evidence to be entertained although a motion for return has not been filed until after the trial has technically begun. The "conclusions announced" in the *Gouled* case are broad enough to dispense with any preliminary motion for return of the papers, and such broad conclusions seem to be the basis of the decision in the *Amos* case. Technically, however, it is still possible for the court to hold that some preliminary foundation must still be laid for an objection to the introduction of evidence wrongfully obtained. On its facts the *Amos* case goes no further than that a motion for return of papers is seasonable if made before the introduction of any evidence in the case.

Another of the questions certified to the Supreme Court in the *Gouled* case assumed that the evidence was rightly obtained for a valid purpose under a valid warrant and inquired whether such

papers could be used in evidence against their owner when on trial for a different offense than that with which he was charged when the seizure was made. To this Mr. Justice Clarke replied:

> "It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it, and we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the government, may not be used in the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him. The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question relates had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused to which they constituted relevant evidence."

As we have seen, *Burdeau* v. *McDowell*[24] holds that the government may rightfully acquire papers by gift from a thief, so far as the prohibition against searches and seizures is concerned. The case also holds that papers so acquired may be used against their owner in proceedings before the grand jury without violating the privilege against self-incrimination. On this point Mr. Justice Day says:

> "The Fifth Amendment, as its terms import is intended to secure the citizen from compulsory testimony against himself. It protects from extorted confessions, or examinations in court proceedings by compulsory methods.
>
> The exact question to be decided here is: May the government retain incriminating papers, coming to it in the manner described, with a view to their use in a subsequent investigation by a grand jury where such papers will be part of the evidence against the accused, and may be used against him upon the trial should an indictment be returned?

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[24] Note 18, *supra.*

We know of no constitutional principle which requires the government to surrender the papers under such circumstances. Had it learned that such incriminatory papers, tending to show a violation of federal law, were in the hands of a person other than the accused, it having had no part in wrongfully obtaining them, we know of no reason why a subpoena might not issue for the production of the papers as evidence. Such production would require no unreasonable search or seizure, nor would it amount to compelling the accused to testify against himself.

The papers having come into the possession of the government without a violation of petitioner's rights by governmental authority, we see no reason why the fact that individuals, unconnected with the government, may have wrongfully taken them, should prevent them for being held for use in prosecuting an offense where the documents are of an incriminatory character.

In dissenting Mr. Justice Brandeis said:

"That the court would restore the papers to plaintiff if they were still in the thief's possession is not questioned. That it has power to control the disposition of these stolen papers, although they have passed into the possession of the law officer, is also not questioned. But it is said that no provision of the Constitution requires their surrender and that the papers could have been subpoenaed. This may be true. Still I cannot believe that action of a public official is necessarily lawful because it does not violate constitutional prohibitions and because the same result might have been attained by other and proper means. At the foundation of our civil liberty lies the principle which denies to government officials an exceptional position before the law and which subjects them to the same rules of conduct that are commands to the citizen. And in the development of our liberty insistence upon procedural regularity has been a large factor. Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play."

Mr. Justice Holmes joined in this dissent.

The question in *Arndstein* v. *McCarthy*[25] was whether the filing of schedules by a bankrupt in involuntary proceedings constitutes a waiver of his privilege against self incrimination with respect to questions with regard to them in bankruptcy proceedings when a statute provides that his answers to such questions may not be used against him in criminal proceedings. A negative answer is supported by Mr. Justice McReynolds as follows:

> "The schedules, standing alone, did not amount to an admission of guilt or furnish clear proof of crime, and the mere filing of them did not constitute a waiver of the right to stop short whenever the bankrupt could fairly claim that to answer might tend to incriminate him. * * * It is impossible to say from mere consideration of the questions propounded, in the light of the circumstances disclosed, that they could have been answered with entire impunity. * * *
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> 'No person * * * shall be compelled in any criminal case to be a witness against himself.' Fifth Amendment. 'This provision must have a broad construction in favor of the right which it was intended to secure.' 'The object was to secure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime.'
>
> The protection of the Constitution was not removed by the provision in section 7 of the Bankruptcy Act: 'No testimony given by him shall be offered in evidence against him in any criminal proceeding.' 'It could not and would not prevent the use of his testimony to search out other testimony to be used in evidence against him or his property.' "[26]

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[25] 254 U. S. 71, 41 Sup. Ct. 26 (1920). Mr. Justice Day did not sit. Mr. Rufus R. Day was of counsel for Mr. Arndstein.

[26] The privilege against self-incrimination is considered in Ernest Bruncken, "Making the Accused Testify Against Himself," 5 MARQUETTE L. REV. 82; and a note in 5 MINN. L. REV. 475 on a case holding that an assured may be compelled to submit to examination as to the cause of a fire when he has made an agreement to that effect in his contract of insurance.

Constitutional provisions prescribing the place of trial are considered in 5 MINN. L. REV. 148, 69 U. PA. L. REV. 361, and 7 VA. L. REV. 313; arrest without warrant, in 15 ILL. L. REV. 464; denial of public trial by excluding

3. *Substantive Elements in Crime Charged*

(a) Freedom of Speech. A certain Mr. Gilbert told a Minnesota audience that they had had nothing to say about who should be president or governor or whether America should go into the war against Germany and that "we were stampeded into this war by newspaper rot to pull England's chestnuts out of the fire for her." For this he was convicted of violating a section of the Minnesota statute forbidding teaching or advocacy that the citizens of the state should not aid the United States in prosecuting a war against its enemies. In *Gilbert* v. *Minnesota*[27] this conviction was held not to be an infringement of the right of free speech. Mr. Justice McKenna points out that, at the time the offending speech was made, the war was flagrant and armies were enlisting and that the purpose of the speech was necessarily the discouragement of such enlistment. Thus indirectly he seems to answer the contention of Mr. Justice Brandeis's dissenting opinion that the state statute applied to times of peace as well as of war and that the section under which the indictment was brought was so broad as to apply to fathers and mothers who in the privacy of their homes urged their sons not to enlist. The majority do not pass on the question whether the Fourteenth Amendment restricts the states as the First Amendment restricts the United States, since they approve of the conviction under the state statute on the basis of decisions sustaining convictions under the federal espionage laws. Mr. Justice McKenna quoted with approval his own comments in an earlier opinion that "the curious

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public, including relatives of accused, in trial for statutory rape, in 5 MINN. L. REV. 554; a case holding that the right to assistance of counsel does not include privilege of discharging counsel and so of addressing the jury personally, in 5 MINN. L. REV. 553; waiver of privilege of confrontation of jury, in 19 MICH. L. REV. 439.

Discussions of double jeopardy may be grouped as follows: appeal by state in criminal cases, in 19 MICH. L. REV. 79; previous conviction on void indictment, in 20 COLUM. L. REV. 915, 69 U. PA. L. REV. 171, and 30 YALE L. J. 864; acquittal of murder as bar to indictment for involuntary manslaughter, in 69 U. PA. L. REV. 278; offenses against state and federal liquor laws, in 34 HARV. L. REV. 785 and 19 MICH. L. REV. 647; offenses against both state and city, in 7 VA. L. REV. 636.

[27] 254 U. S. 325, 41 Sup. Ct. 125 (1920), 20 MICH. L. REV. 10, 265. See 21 COLUM. L. REV. 483, 15 ILL. L. REV. 530, 19 MICH. L. REV. 870, and 30 YALE L. J. 623.

spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself," and he declared that every word that Mr. Gilbert "uttered in denunciation of the war was false, was a deliberate misrepresentation of the motives which impelled it, and the objects for which it was prosecuted," and that Mr. Gilbert knew that the war "was not declared in aggression, but in defense, in defense of our national honor, in vindication of the 'most sacred rights of our nation and our people.' "[28]

(b) Indefiniteness of criminal statute. In a series of cases the so-called Lever Act by which Congress undertook as a war measure to regulate the prices of necessaries was declared unconstitutional for its failure sufficiently to specify any standard for determining whether the prices exacted were "excessive." Mr. Justice Pitney, with whom Mr. Justice Brandeis agreed, urged that the statute forbade only a conspiracy to exact excessive prices for necessaries and that the isolated acts of individuals could not be punished under this prohibition against conspiracy. He contended also that another section declaring it unlawful to make any unjust or unreasonable rate or charges in the handling of necessaries is confined to charges for services and does not embrace the price for the sale of the goods. The majority found the words "broad enough to embrace the price at which a commodity is sold," but held that the words "unjust," "unreasonable" and "excessive" are so vague as to fail to inform persons accused of the nature and cause of the accusation against them within the prescription of the Sixth Amendment. The leading case was *United States* v. *L. Cohen Grocery Co.*[29] in which Chief

[28] Discussions of freedom of speech appear in Edward S. Corwin, "Freedom of Speech and Press under the First Amendment," 30 YALE L. J. 48; Herbert F. Goodrich, "Does the Constitution Protect Free Speech?" 19 MICH. L. REV. 487; James Parker Hall, "Free Speech in War Time," 21 COLUM. L. REV. 526; W. A. S., "Prosecutions under the Espionage Act and Lessons Therefrom," 24 LAW NOTES 165; and notes in 16 ILL. L. REV. 64 and 30 YALE L. J. 68, 861.

[29] 255 U. S. 81, 41 Sup. Ct. 298 (1921), 20 MICH. L. REV. 9. See 16 ILL. L. REV. 66, 19 MICH. L. REV. 648, 69 U. PA. L. REV. 381, 6 VA. L. REG. n. s. 935, and 30 YALE L. J. 639. For discussions prior to the Supreme Court decisions, see 21 COLUM. L. REV. 394, 19 MICH. L. REV. 337, 437, 5 MINN. L. REV. 298, 69 U. PA. L. REV. 56, and 30 YALE L. J. 81, 98, 99.

Justice White referred to the failure of administrative officers and trial courts to agree as to any standard prescribed by the act and declared that the effect of enforcing it "would be the exact equivalent of an effort to carry out a statute which in terms penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." Earlier cases relied on by the government were put to one side with the statement that, if the contention based on them were true, it would result that "no standard whatever was required, no information as to the nature and cause of the action was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the Fifth and Sixth Amendments and of other plainly applicable provisions of the Constitution." The Chief Justice ventured the further point that in statutes previously sustained against the charge of indefiniteness "a standard of some sort was afforded." This decision was followed in *Tedrow* v. *Lewis & Son Co.*,[30] *Kennington* v. *Palmer*,[31] *Kinnane* v. *Detroit Creamery Co.*,[32] *Weed & Co.* v. *Lockwood*,[33] *Willard Co.* v. *Palmer*,[34] *Oglesby Grocery Co.* v. *United States*,[35] and *Weeds Inc.* v. *United States*.[36] Only in the last case did Justices Pitney and Brandeis think that the acts of the defendants were within the terms of the statute. This was a conspiracy for charging excessive prices. These two justices voted to reverse the conviction on the ground that the defendants had not been allowed to introduce evidence as to the market value of the goods sold, but Mr. Justice Pitney insisted that the statute was itself constitutional, since its prohibitions referred to the natural standard of market value, the price prevailing under current conditions of supply and demand uninfluenced by manipulation, which was the standard "adhered to by the common law time out of mind."[37]

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[30] 255 U. S. 98, 41 Sup. Ct. 303 (1921).

[31] 255 U. S. 100, 41 Sup. Ct. 303 (1921).

[32] 255 U. S. 102, 41 Sup. Ct. 304 (1921).

[33] 255 U. S. 104, 41 Sup. Ct. 305 (1921).

[34] 255 U. S. 106, 41 Sup. Ct. 305 (1921).

[35] 255 U. S. 108, 41 Sup. Ct. 306 (1921).

[36] 255 U. S. 109, 41 Sup. Ct. 306 (1921).

[37] A case holding a municipal ordinance void for vagueness is treated in 21 COLUM. L. REV. 390; a decision permitting the jury to pass on the reasonableness of speed, in 19 MICH. L. REV. 218. For a general discussion of the

(c) Guilty Knowledge of Defendant. A federal statute punishing the possession without lawful authority of any die in the likeness of a die designed for producing genuine coin of the United States was construed in *Baender* v. *Barnett*[38] to apply only to "willing and conscious possession." While this does not mean with any certainty that this restricted construction was essential to the constitutionality of the statute, the result was based on the canon that a statute should be construed if possible so as to avoid "not only the conclusion that it is unconstitutional, but also grave doubts upon that score."[39]

4. *Right of Trial by Jury*

(a) Comment on Evidence. In a criminal case in the District of Columbia in which witnesses for the prosecution and the defense wholly agreed as to the facts, the court charged the jury that though he could not instruct them to bring in a verdict of guilty, a failure to do so could only arise from a flagrant disregard of the evidence, the law, and their obligation as jurors. This was held proper in *Horning* v. *District of Columbia*[40] by a vote of five to four. Mr. Justice McReynolds announced his dissent, and Chief Justice White and Mr. Justice Day concurred in the dissenting opinion of Mr. Justice Brandeis. This opinion insisted that "such a charge is a moral command; and, being yielded to, substitutes the will of the judge for the conviction of the jury." For the majority Mr. Justice Holmes conceded that "perhaps there was a regrettable peremptoriness of tone," but he added that "the jury were allowed the technical right, if it can be called so, to decide against the law and the facts, and that is all there was left for them after the defendant and his witnesses took the stand." His further comment that "if the defendant suffered any wrong, it was purely formal, since, as we have said, there was no doubt of his guilt," brought from Mr.

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problem, see Ernst Freund, "The Use of Indefinite Terms in Statutes," 30 YALE L. J. 437.

[38] 255 U. S. 224, 41 Sup. Ct. 271 (1921). See 30 YALE L. J. 762.

[39] Substantive elements in criminal charges are considered in Emanuel R. Parnass, "Imprisonment for Civil Obligations in Illinois," 15 ILL. L. REV. 559; and a note in 5 MINN. L. REV. 458 on "Contempt—Civil and Criminal."

[40] 254 U. S. 135, 41 Sup. Ct. 53 (1920). See 21 COLUM. L. REV. 190, 34 HARV. L. REV. 442, 19 MICH. L. REV. 325, and 6 VA. L. REG. n. s. 776.

Justice Brandeis the retort: "Whether a defendant is found guilty by a jury, or is declared to be so by a judge, is not, under the federal Constitution, a mere formality. * * * Congress would have been powerless to provide for imposing the punishment except upon the verdict of the jury. * * * I find nothing in the act to indicate that it has sought to do so."[41]

(b) Jurisdiction of Courts Martial. The requirement of the Fifth Amendment as to presentment or indictment of a grand jury specifically excepts "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." The jurisdiction of courts martial is therefore a constitutional question. *Kahn* v. *Anderson*[42] held that military prisoners are subject to trial by court martial even though the sentence being served at the time of the second offense in question included dismissal from the army. *Givens* v. *Zerbst*[43] holds that when the jurisdiction of a court martial is attacked collaterally on habeas corpus proceedings because the record fails to state the jurisdictionary fact that the accused was an officer in the army, the attack may be met by evidence to show the existence of a military status of the accused. General expressions to the contrary in prior opinions must, it was declared, be limited in accordance with the ruling now made, since "the complete right to collaterally assail the existence of every fact which was essential to the exercise by such a limited court of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is conclusive."[44]

5. *Interstate Rendition*

In *Hogan* v. *O'Neill*[45] a gentleman in custody in New Jersey under a warrant from the governor of that state in response to a demand for rendition from the governor of Massachusetts sought

[41] The requisites of procedure before the grand jury are discussed in 21 COLUM. L. REV. 376; the effect of failure to administer the required oath to the jury, in 19 MICH. L. REV. 115.

[42] 255 U. S. 1, 41 Sup. Ct. 224 (1921), 20 MICH. L. REV. 6. See 16 ILL. L. REV. 67 and 30 YALE L. J. 521.

[43] 255 U. S. 11, 41 Sup. Ct. 227 (1921), 20 MICH. L. REV. 6.

[44] The jurisdiction of courts martial is dealt with in 21 COLUM. L. REV. 380, 34 HARV. L. REV. 659, 673, and 16 ILL. L. REV. 56. In 5 MINN. L. REV.

a writ of habeas corpus from the federal district court on the ground that he was not charged with a crime in Massachusetts and was not a fugitive from that commonwealth. In approving of the discharge of the writ the Supreme Court through Mr. Justice Pitney pointed out that the Massachusetts statute provided that the name of the county and the court in the caption of an indictment should be considered an allegation that the act of the accused was committed within the territorial jurisdiction of the court, and that therefore the failure of the indictment to specify the fact did not make it guilty of failure to charge a crime. Failure to charge an overt act in Massachusetts was held unimportant since the crime of conspiracy might be committed without overt acts. On the question whether the relator was a fugitive from Massachusetts his own evidence showed that he was within the state on or about the day charged in the indictment as the time when the alleged crime was committed. Without referring to a possible question as to whether this presence in Massachusetts was before or after the commission of the crime, Mr. Justice Pitney declared:

> "Whether in fact he was a fugitive from justice was for the determination of the Governor of New Jersey. The warrant of arrest issued in compliance with the demand of the Governor of Massachusetts shows that he found appellant to be a fugitive; and this conclusion must stand unless clearly overthrown, which appellant has not succeeded in doing. To be regarded as a fugitive from justice it is not necessary that one shall have left the state in which the crime is alleged to have been committed for the very purpose of avoiding prosecution, but simply that, having committed there an act which by the law of the state constitutes a crime, he afterwards has departed from its jurisdiction and when sought to be prosecuted is found within the territory of another state."[46]

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(To be concluded)

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540 is a note on court martial for civil offenses; in 21 COLUM. L. Rev. 477 a discussion of the revision of the articles of war.

[45] 255 U. S. 52, 41 Sup. Ct. 222 (1921).

[46] The issue when an accused is a fugitive is considered in 7 VA. L. REV. 150; a case holding a pardon not valid until delivered, in 34 HARV. L. REV. 678.